FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. BRIAN COLIN DOHERTY (CRD No. 2647950), Respondent.	Disciplinary Proceeding No. 2015047005801 Hearing Officer–CC

ORDER DENYING ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AND GRANTING IN PART AND DENYING IN PART MOTION TO STRIKE AFFIRMATIVE DEFENSE

I. Background

Enforcement filed a three-cause Complaint on August 2, 2018. Cause one alleges that, between April and June 2015, Respondent Brian Colin Doherty ("Doherty") engaged in a fraudulent, pre-arranged trading scheme in connection with purchases and sales of securities, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Rule 10b-5 thereunder, and FINRA Rules 2010 and 2020.

According to the Complaint, Doherty had known TS, a client of Doherty's and a proprietary trader on the corporate credit-trading desk of member firm Scotia Capital (USA) Inc. ("Scotia"), for several years. TS managed a proprietary account for Scotia. If TS maintained aged positions in the account, the adverse effect on the firm's profits and losses also potentially reduced his personal compensation. During the relevant period, Doherty was an inter-dealer broker at member firm BGC Financial LLC ("BGC"). BGC's written procedures stated that an offer to sell coupled with an offer to buy back at the same or a higher price, or the reverse, is a pre-arranged trade and prohibited.

Cause one alleges that in mid-April 2015, TS and Doherty met outside the office, and TS enlisted Doherty's help in selling and repurchasing aged positions on the same day and for the same price plus a commission so TS could evade financial penalties related to aged positions in the proprietary account he managed at Scotia. TS stated he would use a particular word (Doherty's wife's name) to identify these buy/sell trades. Cause one alleges that, although Doherty generally discussed TS's proposal with his manager and members of BGC's compliance department, he omitted important information from the discussion. Cause one alleges that Doherty ultimately engaged in 19 same-day sets of buy/sell transactions with TS that were pre-arranged, not subject to market risk, and contrary to Scotia's and BGC's policies. Cause one

alleges that Doherty's conduct caused Scotia to sustain a loss of $55,773, and that Doherty used the instrumentalities of interstate commerce, acted with scienter, and defrauded Scotia.

Cause two alleges, as an alternative to cause one, that Doherty's participation in pre-arranged trading with TS was negligent, causing a violation of Sections 17(a)(2) and (a)(3) of the Securities Act of 1933 ("Securities Act") and violating FINRA Rule 2010.

Cause three alleges, as an alternative to causes one and two, that by engaging in pre-arranged trading, Doherty knowingly or recklessly provided substantial assistance to TS's perpetration of a fraud. Cause three alleges that, by aiding and abetting TS's fraud, Doherty violated FINRA Rule 2010.

On August 30, 2018, Doherty filed an Answer in which he denies all allegations of wrongdoing. Doherty asserts as an affirmative defense, without elaboration, that the allegations of the Complaint are barred by the doctrines of the waiver, estoppel, ratification, and laches.

On December 21, 2018, Enforcement filed a motion for summary disposition on liability as to cause one and to strike Doherty's affirmative defense. Enforcement argues that Doherty has admitted under oath on two separate occasions—in a February 2017 arbitration proceeding against BGC and in May 2017 on-the-record testimony before FINRA— the facts to support its allegations. Enforcement further argues that Doherty's single affirmative defense is unsupportable factually.

On January 25, 2019, Doherty opposed Enforcement's summary disposition motion. Doherty admits that he executed the trades at issue and that he had discussed the trades with TS beforehand. He also admits that TS told him he could lose financially if he held aged positions. Doherty argues that there are numerous disputed facts, and the Hearing Panel should hear TS's and Doherty's testimony to evaluate whether Doherty engaged in fraudulent conduct as alleged. Doherty's opposition is silent as to Enforcement's motion to strike. In a subsequent filing, Doherty states that he takes no position with regard to the motion to strike.

On January 29, 2019, Enforcement requested leave to file a reply. I have accepted Enforcement's reply memorandum.

As explained in detail below, I deny Enforcement's motion for summary disposition. I find material facts are in dispute, as are the inferences that can be drawn from disputed and undisputed facts. As such, Enforcement has not demonstrated it is entitled to summary disposition as to cause one. As also explained below, I deny in part and grant in part Enforcement's motion to strike Doherty's affirmative defense.

II. Motion for Summary Disposition

A. Summary Disposition Standards

FINRA Rule 9264(e) establishes a two-prong test for the consideration of motions for summary disposition. The rule permits summary disposition only if both prongs are satisfied.

First, there must be no genuine issue with regard to any material fact. Rule 9264(e) states that the facts alleged in the pleadings of the party against whom the motion is made, in this case Doherty, shall be taken as true, except as modified by stipulations or admissions made by the non-moving party, uncontested affidavits or declarations, or facts officially noticed pursuant to Rule 9145. Second, the moving party must be entitled to summary disposition as a matter of law.[1] The burden is on the moving party, here Enforcement, to prove the absence of a genuine issue of material fact.[2] Once the moving party has met its burden, the opposing party must show that there exists a genuine issue for hearing.[3]

Although the Federal Rules of Civil Procedure do not apply in FINRA disciplinary proceedings, a Hearing Officer may find guidance in Rule 56 of the Federal Rules and related case law when considering a motion for summary disposition.[4] Case law related to Rule 56 indicates that inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing summary disposition.[5] When determining whether summary disposition is appropriate, an adjudicator's function is not to weigh the evidence and determine the truth of the case presented.[6] An adjudicator must instead determine whether the evidence presents a disagreement sufficient to require submission to fact finding.[7]

B. Discussion

Cause one alleges that Doherty engaged in manipulative and deceptive acts and a scheme to defraud by executing 19 pre-arranged, intra-day transactions involving offsetting sales and purchases of securities at pre-agreed prices, without taking market risk and for no legitimate

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[1] *See* OHO Order 17-02 (2014042291901) (Feb. 7, 2017), http://www.finra.org/sites/default/files/OHO_Order_17-02_2014042291901.pdf (denying summary disposition in part because material facts were in dispute); OHO Order 15-07 (2013036217601) (Apr. 2, 2015), http://www.finra.org/sites/default/files/OHO-Order-15-07-ProceedingNo.2013036217601.pdf (granting in part and denying in part summary disposition based on the standards established in FINRA Rule 9264).

[2] *Dep't of Enforcement v. Respondent*, No. C02050006, 2007 NASD Discip. LEXIS 13, at *12 (NAC Feb. 12, 2017).

[3] *Id.*

[4] *Dep't of Enforcement v. Respondent*, 2007 NASD Discip. LEXIS 13, at *12 n.9 (citing *Dep't of Enforcement v. U.S. Rica Fin., Inc.*, No. C01000003, 2003 NASD Discip. LEXIS 24, at *12 & n.3 (NAC Sept. 9, 2003)); OHO Order 17-02 (2014042291901), at 4-5. FINRA's disciplinary proceedings are governed by FINRA's own procedures, as established in the FINRA Rule 9000 Series. Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence are binding in FINRA disciplinary proceedings, although they and the case law developed under the auspices of these rules may be consulted for guidance as appropriate. OHO Order 12-02 (2011029760201) (Apr. 5, 2012), at 5, http://www.finra.org/sites/default/files/OHODecision/p126070.pdf.

[5] *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (*citing United States* v. *Diebold, Inc*., 369 U.S. 654, 655 (1962)); OHO Order 15-07 (2013036217601), at 4-5; OHO Order 07-37, (2005001919501) (Oct. 16, 2007), at 10, http://www.finra.org/sites/default/files/OHODecision/p037809.pdf, (citing *Frank P. Quattrone*, Exchange Act Release No. 53547, 2006 SEC LEXIS 703, at *18 n.24 (Mar. 24, 2006)).

[6] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

[7] *Id.* at 251-252.

business purpose, in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rules 2010 and 2020. In order to find a violation of Section 10(b), Rule 10b-5, and FINRA Rule 2020, the Hearing Panel must find that Doherty acted with scienter.[8] Scienter is the "intent to deceive, manipulate or defraud."[9] Enforcement may establish scienter by showing that the respondent acted recklessly.[10] "[S]ince it is impossible to probe into the depths of a man's mind, a finding of fraudulent intent, absent an admission, must be based on inferences drawn from the evidence."[11] Thus, the inferences to be drawn from the facts, whether or not disputed, are particularly pertinent in this case.

Enforcement argues that there is no factual dispute that Doherty spoke in advance with TS about the trades at issue, approached his supervisor and two compliance personnel to discuss and seek approval of his trading activity with TS, and executed the trades at issue. Enforcement also contends that there is no dispute that Doherty's supervisor and BGC's compliance personnel advised Doherty that the trades must be subject to market risk. While Doherty concedes he spoke in advance of the trades with TS and BGC personnel, the substance of Doherty's conversations with BGC personnel and the advice they gave Doherty are in dispute. Also in dispute are the specifics of Doherty's disclosures to BGC personnel and the inferences to be drawn from those facts. Furthermore, there is significant dispute as to the context in which BGC personnel advised Doherty as to market risk and the inferences to be drawn from the use of that term.

Enforcement argues that certain of Doherty's conduct, such as splitting tickets, switching the order of trades, and using telephone rather than email to communicate about the trades, demonstrates that he attempted to conceal his and TS's trading pattern. While Doherty admits many of the underlying allegations as to his actual conduct, he disputes the inferences to be drawn from his conduct. "[I]f there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed," summary disposition must be denied.[12] Here, the issue of whether the evidence demonstrates Doherty's efforts to conceal goes directly to scienter.

Enforcement further contends that TS and Doherty did not even have two calls for each series of trades. Doherty disputes this and states that there were two calls for each set of transactions. This is a material fact related to the allegations of cause one, and the parties do not agree as to this fact.

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[8] *Thomas C. Gonnella*, Exchange Act Release No. 78532, 2016 SEC LEXIS 2786, at *23 (Aug. 10, 2016).

[9] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

[10] *See DWS Securities Corp.*, 51 S.E.C. 814, at 820-21 (1993).

[11] *Lawrence H. Ripp*, 46 S.E.C. 771, 773 (1977) (internal citations omitted).

[12] *Ideal Dairy Farms, Inc. v. John Labatt, Ltd*., 90 F.3d 737, 744 (3d Cir. 1996) (internal citations omitted).

Enforcement argues that Doherty knew that the trades would violate Scotia's internal policies and the trades would and did result in losses for Scotia. Conversely, Doherty denies familiarity with Scotia's internal policies and contends he was not aware at the time what affect, if any, these transactions would have on Scotia's financial condition. He also asserts that he did not know when Scotia had purchased the securities at issue or how long they were aged. Doherty argues that what he believed, understood, and discussed with his counterparty to the trades (TS) and what ultimately motivated his actions are disputed issues left to the Hearing Panel to determine. Doherty's argument is well taken. Many of these disputed facts and the inferences to be drawn from the facts relate directly to whether Doherty acted with scienter, a pivotal issue in this case.

Based on the Complaint, Answer, Enforcement's motion and reply, and Doherty's opposition, it is apparent there is dispute on key factual allegations and the inferences to be drawn from the facts relating to cause one. Accordingly, I deny Enforcement's motion for summary disposition as to cause one.

III. Motion to Strike Respondent's Affirmative Defense

Doherty's Answer states, as a single affirmative defense, that Enforcement's action is barred by the doctrines of waiver, estoppel, ratification, and laches. Enforcement moves to strike the defense, contending that, to the extent Respondent has asserted a cognizable defense, it is factually unsupported. Doherty takes no position on the motion.

A. Motion to Strike Standards

"An affirmative defense is a respondent's assertion raising facts and arguments that, if true, will defeat the claims against the respondent, even if all of the allegations in the complaint are proven."[13] FINRA Rule 9136(e) permits a Hearing Officer to strike "[a]ny scandalous or impertinent matter contained in any brief, pleading, or other filing." While the rule does not speak directly to motions to strike defenses, the National Adjudicatory Council has recognized that "[t]he practice in disciplinary proceedings is to strike those affirmative defenses that do not constitute a valid defense to avoid wasting time litigating irrelevant facts."[14] In ruling on motions to strike, Hearing Officers have looked for guidance from the cases decided under Rule 12(f) of the Federal Rules of Civil Procedure, which governs motions to strike.[15]

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[13] *Dep't of Enforcement v. Bullock*, No. 2005003437102, 2011 FINRA Discip. LEXIS 14, at *56 (NAC May 6, 2011) (citing *Rochelle Saks v. Franklin Covey Co.*, 315 F.3d 337, 350 (2d Cir. 2003)).

[14] *Bullock*, 2011 FINRA Discip. LEXIS 14, at *56 (quoting *Dep't of Enforcement v. Epstein*, No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *88 (NAC Dec. 20, 2007).

[15] *See* OHO Order 07-21 (E102003025201) (July 11, 2007), at 6–7, http://www.finra.org/sites/default/files/OHO Decision/p037016_0_0_0.pdf.

Those cases set forth certain principles that are instructive here. As a general matter, motions to strike are not favored.[16] "Nevertheless, 'a defense that might confuse the issues in the case and would not, under the facts alleged, constitute a valid defense to the action can and should be deleted.'"[17] Also, "[s]triking an affirmative defense is warranted if it cannot, as a matter of law, succeed under any circumstance."[18]

B. Discussion

It is impossible to discern from Doherty's Answer the basis for his affirmative defense, which states in its entirety, "Complainant's causes of action are barred by the doctrines of waiver, estoppel, ratification, and laches." Doherty indicates that he takes no position on Enforcement's motion and avers, "The presence or absence of the affirmative defense has no material effect on Respondent's substantive defenses to the allegations contained in the Complaint."

Respondent has offered no support for how or why the doctrines of waiver, estoppel, and ratification apply in FINRA proceedings in general or in this proceeding in particular. Although Respondent has not explained his laches defense in the context of this case, Hearing Panels have considered the doctrine of laches when raised as an affirmative defense.[19] The remaining defenses are not valid in this action. Accordingly, I strike Respondent's affirmative defenses of waiver, estoppel, and ratification. I deny Enforcement's motion to strike Respondent's defense of laches or unfair delay.

IV. Conclusion

Enforcement has not demonstrated that there are no genuine issues with regard to material facts. Accordingly, I deny Enforcement's motion for summary disposition. I grant Enforcement's motion to strike Doherty's affirmative defenses of waiver, estoppel, and ratification, as they are not valid defenses in this matter. I deny Enforcement's motion to strike Respondent's defense of laches or unfair delay.

SO ORDERED.

Carla Carloni
Hearing Officer

[16] *Emp'rs Ins. Co. of Wausau v. Crouse-Cmty. Ctr., Inc.*, 489 F. Supp. 2d 176, 179 (N.D.N.Y. 2007).

[17] *Waste Mgmt. Holdings v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001) (quoting 5A A. Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 1381, 665 (2d ed. 1990)).

[18] *United States v. Renda*, 709 F. 3d. 472, 479 (5th Cir. 2013) (internal citations omitted).

[19] *See, e.g., Dep't of Enforcement v. Clay*, No. 2014039775501, 2018 FINRA Discip. LEXIS 28, at *53 (OHO Sept. 14, 2018) (evaluating respondent's laches defense). *See also Mark H. Love*, Exchange Act Release No. 49248, 2004 SEC LEXIS 318, at *14-16 (Feb. 13, 2004) (reviewing NASD's analysis of respondent's unfair delay claim).

Dated: January 30, 2019

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